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ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93M-603

In re Applications of)	MM DOCKET NO. 93-107	32438
DAVID A. RINGER)	File No. BPH-911230MA	
ASF BROADCASTING CORPORATION)	File No. BPH-911230MB	
WILBURN INDUSTRIES, INC.)	File No. BPH-911230MC	
SHELLEE F. DAVIS)	File No. BPH-911231MA	
OHIO RADIO ASSOCIATES, INC.)	File No. BPH-911231MC	
For Construction Permit for)		
an FM Station on Channel 280A,)		
in Westerville, Ohio)		

MEMORANDUM OPINION AND ORDER

Issued: September 20, 1993 ; Released: September 22, 1993

1. Ohio Radio Associates, Inc. (ORA) seeks a ruling on a "Motion to Enlarge Against Ringer." ORA filed their motion on August 18, 1993 and wants both a financial and financial misrepresentation issue specified against David A. Ringer.

2. Ringer opposed ORA's motion on September 7, 1993, and ORA replied on September 17, 1993.

Preliminary Ruling

3. ORA's enlargement request is late-filed. Timely motions to enlarge should have been filed on or before May 24, 1993. See 47 CFR 1.229(b)(2) and 58 F.R. 21580 published April 22, 1993.

4. ORA argues that its motion is timely filed since it "...is based on the deposition testimony of Ringer and is filed within fifteen (15) days of receipt of the deposition transcripts. . ."¹

5. That argument is rejected. ORA has had since December 30, 1991, to garner and firm up their financial allegations against Ringer. In any event, automatic document production took place on May 10, 1993. So even if ORA hadn't done its homework in 1992 and the first part of 1993, there is no excuse for their not having their financial allegations firmed up by June 9, 1993. ORA's motion is tardy in the extreme.

¹ ORA's pleading contains no specific dates. So it is impossible to verify whether their timeliness assertion can even be analyzed, let alone credited.

6. A party has no right to wait until after depositions are taken before moving to enlarge issues against their opponent(s). To the contrary, the Commission has expressly admonished them not to do so. See Discovery Procedures, 12 FCC 2d 185 (1968) at para 7. This tactic of waiting until after discovery has been completed before moving to enlarge the issues is a procedure that should be discouraged. It prolongs hearings and frequently leads to two-phase or even three-phase hearings.²

Ruling

7. Since ORA's motion is untimely, their allegations must be analyzed under the Commission's reassessed Edgefield-Saluda doctrine. See Adjudicatory Re-Regulation Proposals, 58 FCC 2d 865 (1976) and 47 CFR 1.229(c). There (at 873-874) the Commission said this:

"...An untimely motion to enlarge will be considered fully on its merits only if it raises a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of its untimely filing. It is expected that this standard will be strictly construed."

8. Giving ORA's allegations the strict construction they deserve they fail to pass muster. ORA asserts that Ringer failed to properly budget certain cost items in his "Business Plan;" namely, the cost of a directional antenna, a programming budget, payroll taxes and auxiliary power equipment. These assertions hardly qualify as questions of probable decisional significance. Nor can it be said that their arguments raise any questions of such substantial public interest importance that it warrants a Phase II hearing.

9. Even assuming ORA's allegations were timely filed, they would still be rejected for any one of three reasons.

10. First, ORA's allegations are financial allegations. As such they fail to meet the standard the Commission laid down in Revised Processing Applications, 72 FCC 2d 202 (1979) at 222 (para.60). Stated simply, ORA has totally failed to show, or even attempted to show that Ringer has misrepresented his finances or grossly omitted some decisionally significant financial item that would render his proposal totally defective.

² ORA didn't file their enlargement request against Ringer until after the parties had exchanged their direct case exhibits on August 16, 1993, and only two days before the Evidentiary Admission Session. So ORA is obviously fishing for a Phase II hearing.

11. Secondly, and even applying the less stringent standards of 47 CFR 1.229(d), ORA hasn't pleaded with the required sufficiency and specificity to warrant adding the issue she seeks.³

12. Third, and finally, were we to seriously consider ORA's arguments, Ringer has effectively rebutted them. In his Opposition Ringer shows that he made a good faith attempt to budget the costs of construction and operation of his station and that he is financially qualified to follow through on his proposal.

SO the "Motion to Enlarge The Issues Against David A. Ringer" that Ohio Radio Associates, Inc. filed on August 18, 1993, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Walter C. Miller
Administrative Law Judge

³ 47 CFR 1.229(d) governs timely motions to enlarge. It provides in pertinent part that "[s]uch motions shall contain specific allegations of fact sufficient to support the action requested. . ."